(3)

No. 93-1547

Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

IN RE DAVID SMITH, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

17pp

QUESTIONS PRESENTED

1. Whether the disciplinary panel of the United States Court of Appeals for the Tenth Circuit erred in suspending petitioner from practicing law before the court of appeals until he pays monetary sanctions previously imposed against him by the court of appeals and a district court.

2. Whether the court of appeals disciplinary panel erred in not taking account of petitioner's alleged inability to pay monetary sanctions when petitioner did not raise the issue until he filed a petition for rehearing.

3. Whether the court of appeals disciplinary panel abused its discretion, or denied petitioner due process, by denying petitioner's request for an evidentiary hearing.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

American Policyholders Ins. Co. v. *Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993), cert. denied, 114 S. Ct. 682 (1994)	11
Casillan v. *Regional Transp. Dist.*, cert. denied, No. 93-1771 (June 20, 1994)	7
Coastal Transfer Co. v. *Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d 208 (9th Cir. 1987)	3
Codd v. *Velger*, 429 U.S. 624 (1977)	12
Cohen v. *Beneficial Insdus. Loan Corp.*, 337 U.S. 541 (1949)	3
Deherrera v. *City of Denver*, Nos. 93-1070 and 93-1139 (10th Cir. Sept. 3, 1993)	2
Dunkin v. *Louisiana-Pacific Corp.*, Nos. 92-1230 and 92-1381 (10th Cir. Feb. 11, 1993), cert. denied, 114 S. Ct. 87 (1993)	9
G.J.B. & Assocs. v. *Singleton*, 913 F.2d 824 (10th Cir. 1990)	2-3
Hendrix v. *Page* (*In re Hendrix*), 986 F.2d 195 (7th Cir. (1993)	3
Keating v. *FERC*, 927 F.2d 616 (D.C. Cir. 1991)	11
McEnery v. *Merit Systems Protection Board*, 963 F.2d 1512 (Fed. Cir. 1992)	3
McKnight v. *General Motors Corp.*, 114 S. Ct. 1826 (1994)	9
Pierce v. *Underwood*, 487 U.S. 552 (1988)	12

Cases–Continued: Page

Software Centre Int'l, In re, 994 F.2d 682 (9th Cir. 1993) 10

Statutes and rules:

28 U.S.C. 1291 3
28 U.S.C. 1927 ..... 2, 3, 4, 5
Fed. R. App. P. 38 ..... 4, 5, 6
Fed. R. Civ. P. 11 2
10th Cir. R. 46.5 4
10th Cir. R., Addendum III, § 4.3 12

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1547

IN RE DAVID SMITH, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

The Solicitor General submits this brief on behalf of respondent, the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 10 F.3d 723.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1993. A petition for rehearing was denied on January 3, 1994. Pet. App. A7. The petition for a writ of certiorari was filed on March 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A disciplinary panel of the Tenth Circuit suspended petitioner, an attorney, from the practice of law before that court until he pays all sanctions previously imposed on him by that court and the district court. Pet. App. A3. The previously imposed sanctions arose out of cases in which petitioner had filed motions or appeals deemed frivolous by the courts in which they were filed. Petitioner seeks review of the Tenth Circuit's order suspending him from practice before that court until the sanctions are paid.

1. On September 3, 1993, the Tenth Circuit entered an order and judgment in *Deherrera* v. *City of Denver*, Nos. 93-1070 and 93-1139 (Pet. App. A102-A112), dismissing the appeal and denying an accompanying petition for writ of mandamus. The court of appeals concluded that it lacked jurisdiction because the appeal was from an order imposing sanctions against petitioner in a case in which he was counsel of record that was still pending in the district court.[1] Under the controlling Tenth Circuit

---

[1] The *Deherrera* appeal arose out of a February 4, 1993, district court order in an employment discrimination case in which petitioner was counsel for plaintiff. The court ordered that, pursuant to 28 U.S.C. 1927, petitioner was to pay the attorneys' fees incurred by the opposing party in responding to petitioner's four motions for reconsideration of a magistrate judge's order. Pet. App. A104. Prior to those four motions, petitioner had filed six other motions for reconsideration of the magistrate judge's order and had been cautioned about the lack of merit of those motions. *Id.* at A104-A105. The original March, 1992, magistrate judge's order that was the subject of the reconsideration motions had imposed sanctions against petitioner under Federal Rule of Civil Procedure 11.

On March 1, 1993, the district court entered an order that petitioner pay the $2,287.50 imposed under Rule 11 by the March,

precedent of *G.J.B. & Assocs.* v. *Singleton*, 913 F.2d 824 (1990), the attorney sanction order was not a final order appealable under 28 U.S.C. 1291 and was not appealable under the collateral order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Pet. App. A105-A106.

The court of appeals noted that petitioner cited *G.J.B.* in his brief on the jurisdictional question (see Pet. App. A67-A83), but did "not recognize it as controlling authority," and instead contended that the sanction order was appealable under *Cohen*. *Id.* at A106. The court pointed out that in *G.J.B.* it had rejected petitioner's precise argument and the authority from other circuits on which petitioner relied.

The appellees in *Deherrera* claimed that the appeal was frivolous and requested sanctions of $1,200 in attorneys fees incurred responding to the appeal. Pet. App. A106. The court of appeals found that petitioner's argument was not "a good faith argument for overruling or creating an exception to *G.J.B.*" *Id.* at A109. The court concluded that petitioner "is simply 'appealing in the face of dispositive contrary authority without making arguments for overruling it,' which is a basis for finding his appeal frivolous." *Id.* at A109-A110 (citing *Hendrix* v. *Page* (*In re Hendrix*), 986 F.2d 195, 200 (7th Cir. 1993); *McEnery* v. *Merit Systems Protection Board*, 963 F.2d 1512, 1516-1517 (Fed. Cir. 1992); *Coastal Transfer Co.* v. *Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d 208, 212 (9th Cir. 1987)).

1992, order and the $7,627.50 imposed under Section 1927 by the February, 1993, order. Petitioner sought immediate appellate review of the March 1, 1993, order and the court of appeals directed the parties to brief the question of jurisdiction. Pet. App. A105.

The court further stated:

> what makes this appeal particularly egregious is the fact that twice within the past seven months we have similarly dismissed appeals of sanction orders filed by [petitioner] and cited *G.J.B.* on both occasions. *See Sandlin v. Canady (In re Canady)*, No. 92-1169 (10th Cir. April 27, 1993) (Order and Judgment on petition for rehearing);[2] *Dunkin v. Louisiana-Pacific Corp.*, Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993)[, cert. denied, 114 S. Ct. 87 (1993)] (Order dismissing appeal and remanding for imposition of sanctions for frivolous appeal).[3]

---

[2] In *Sandlin* v. *Canady* (Pet. App. A9-A12), petitioner had filed an appeal from a district court order that imposed sanctions against him and also resolved some, but not all, of the underlying claims in the litigation. The court of appeals initially affirmed the decision of the district court, but subsequently vacated its original decision and dismissed the appeal for lack of jurisdiction. *Id.* at A10-A11. Citing *G.J.B.*, the court's dismissal order expressly informed petitioner that "[t]he order sanctioning [you] is not yet appealable." Pet. App. A11.

[3] In *Dunkin* (Pet. App. A31-A34), petitioner had filed appeals from two other district court sanction orders against him in an action still pending in district court. The court of appeals dismissed the appeals on the basis of *G.J.B.* See Pet. App. A34. In addition, the court reviewed the appellees' request for sanctions against petitioner for his appeals under 28 U.S.C. 1927, Fed. R. App. P. 38 and 10th Cir. R. 46.5 and petitioner's response. The court stated that "[t]he law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment." Pet. App. A33. The court determined that because petitioner nonetheless had chosen to pursue an appeal "after he was informed by this court of a jurisdictional defect," and also filed another appeal with the identical defect, sanctions were appropriate. *Id.* at A34. The court of appeals remanded for assessment of sanctions. *Ibid.*

Pet. App. A110. The court concluded that petitioner's conduct in the appeal therefore was sanctionable under Federal Rule of Appellate Procedure 38[4] and 28 U.S.C. 1927[5] and ordered petitioner to pay $1,200 to appellees. Pet. App. A110-A112. The court also rejected petitioner's mandamus petition.

The court found that petitioner's "actions in both this appeal and other recent appeals warrant review by the court's disciplinary panel." Pet. App. A104. It concluded that petitioner's "practice of appealing in light of contrary controlling authority raises concerns about his fitness to practice before this court." *Id.* at A109-A110. The court referred the matter to the court's attorney disciplinary panel for further proceedings. *Id.* at A112.

2. The Tenth Circuit attorney disciplinary panel issued an order on September 15, 1993, directing petitioner to show cause in writing as to:

> why he should not be fined, disbarred or otherwise disciplined for his actions in * * * Deherrera v. Denver after the entry of this court's orders in Sandlin v. Canaday [*sic*] * * * and Dunkin v. Louisiana-Pacific Corp. * * *. The panel in Deherrera referred this matter to this Discipline Panel because the appeal and petition for writ of mandamus were frivolous. In Casillan v. Regional

---

[4] Federal Rule of Appellate Procedure 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

[5] Section 1927 provides in relevant part:

> Any attorney * * * who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

> Transportation District, [986 F.2d 1426 (Table)] (10th Cir. January 15, 1993), the court also found the appeal to be frivolous.[6] Filing a frivolous appeal is a ground for discipline because it is a violation of 10th Cir. R. 46.5.

Pet. App. A5-A6.

On October 4, 1993, petitioner filed a response, repeating the arguments that the sanctions order in

---

[6] In *Casillan* (Pet. App. A39-A62), the district court had dismissed a complaint petitioner had filed because it failed to state claims upon which relief could be granted. See *id.* at A46. The district court also adopted the magistrate judge's order that petitioner pay the attorneys' fees incurred by the defendants in responding to an "unwarranted and frivolous" motion to reconsider filed by petitioner. See *id.* at A57.

The court of appeals affirmed. In addition, the court of appeals imposed sanctions against petitioner under Fed. R. App. P. 38 for filing a frivolous appeal. Pet. App. A60-A62. The court of appeals emphasized:

> Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts for the past two years. This action has been groundless from the day of filing, and the agonies visited upon the defending parties and their counsel by [petitioner] and his relentless aggressiveness cannot be allowed to go unanswered. Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.

Id. at A61-A62. Petitioner's petition for a writ of certiorari, seeking review of the sanctions order, was denied by this Court on June 20, 1994. *Casillan* v. *Regional Transp. Dist.*, No. 93-1771.

Deherrera should be appealable under *Cohen* and contending that he was making good faith arguments for extension, modification or reversal of current law as permitted under local rules as well as establishing a record for further review by this Court. See Pet. C.A. Verified Response to Order to Show Cause 13-15 (Oct. 4, 1993). Petitioner also contended that his petition for writ of mandamus was appropriate because his motions for reconsideration in the district court were not vexatious or unreasonable and that the mandamus case had not been cited as a basis for the disciplinary referral. *Id.* at 15-19. Petitioner requested that he be notified if charges were brought against him for actions taken in cases other than *Deherrera*. *Id.* at 20-21.

On October 20, 1993, the disciplinary panel set the matter for hearing on November 12, 1993, and ordered that petitioner file a supplemental response addressing why he should not be disciplined for filing frivolous appeals in *Casillan*. See Pet. C.A. Request for Additional Time (Oct. 22, 1993). On October 22, 1993, petitioner submitted a request for additional time to file a supplemental response, and requested, for the first time, an evidentiary hearing. *Ibid.*

On November 2, 1993, petitioner filed a supplemental response, contending that he should not be disciplined for his appeals in *Casillan* because he was denied due process by not being notified that sanctions were being considered or given an opportunity to respond before final judgment in *Casillan*. Pet. C.A. Verified Supp. Response to Order to Show Cause (Supp. Response) 18-20 (Nov. 2, 1993). Petitioner contended that he presented colorable legal issues in his appeals and challenged the trial judge's impartiality. Petitioner asserted that his case would require presentation of unspecified "exten-

sive evidentiary material, including expert testimony" and requested an evidentiary hearing. *Id.* at 29-30.

The disciplinary panel denied petitioner's request for an evidentiary hearing and heard oral argument on November 12, 1993. At oral argument, petitioner admitted that he had not paid any of the sanctions that had been imposed on him by the Tenth Circuit or the district court. Pet. App. A3.

On November 29, 1993, the disciplinary panel ordered that petitioner be suspended from the practice of law before that court "until all sanctions are paid." Pet. App. A3. It stated that petitioner "may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied." *Ibid.* The court rejected petitioner's argument that the appeals in *Deherrera* and *Casillan* were not frivolous, stating that it was bound by the prior rulings of the panels in those cases that the appeals were frivolous. *Id.* at A2.

Petitioner filed a petition for rehearing and suggestion of rehearing en banc asserting, for the first time, that he was unable to pay the sanctions, proposing possible alternative sanctions, and requesting a hearing. Pet. C.A. Rehearing Pet. 3-9.[7] The rehearing petition was denied. Pet. App. A7. Petitioner's motions for stay of his suspension order were denied by the court of appeals and by Justice Ginsburg. See *In re David L. Smith*, Application for Stay, No. 93-673 (Feb. 16, 1994).

ARGUMENT

1. Petitioner's principal argument (Pet. i, 20, 23-34) is that his appeal in *Deherrera* was not frivolous because

---

[7] Petitioner accompanied the rehearing petition with a declaration concerning his financial status.

the Tenth Circuit precedent conflicts with decisions of other circuits that permit appeals from district court orders sanctioning attorneys under *Cohen* while the underlying district court action is still pending. This argument misconstrues the basis for the court of appeals' suspension of petitioner. The only issue before the disciplinary panel was what discipline, if any, to impose on petitioner for litigation conduct that already had been determined to be frivolous. The disciplinary panel did not reconsider the determination by the merits panel in *Deherrera* that petitioner's appeal was frivolous. See Pet. App. A2.

This case is not an appropriate vehicle for resolution of the question of whether petitioner's appeal in *Deherrera* was frivolous. If petitioner wished to have this Court review the frivolousness of his appeal in *Deherrera* or the jurisdictional issue regarding interlocutory appeals of sanction orders, the proper course would have been to file a petition for certiorari in that case. Petitioner followed that course in *Casillan*, the other appeal underlying the present suspension order, as well as in *Dunkin*, and the Court denied both petitions. See note 6, *supra*; 114 S. Ct. 87 (1993). Having failed to seek direct review in a proceeding where the issues were presented and addressed by the court of appeals, petitioner cannot seek review in this collateral proceeding.[8]

---

[8] In a Supplement to Petition for Writ of Certiorari filed June 23, 1994, petitioner points to the ruling in *McKnight* v. *General Motors Corp.*, 114 S. Ct. 1826 (1994), in which the Court vacated an order imposing sanctions for a frivolous appeal where the sanctions may have been based solely on the ground that the attorney's argument was foreclosed by circuit precedent and the attorney had challenged the precedent and pursued the argument to the Supreme Court. As explained above, the questions of the frivolity

2. Petitioner also contends (Pet. i, 21-22, 35-37) that the disciplinary panel should not have conditioned his reinstatement on payment of existing sanctions, because he lacks the financial resources to pay the sanctions.

Petitioner did not raise this issue until he filed a petition for rehearing. Yet petitioner himself admitted, "an ability to pay argument is in the nature of an affirmative defense, thus placing the impetus on the party asserting it to come forward with evidence of financial status." Rehearing Pet. 6. Petitioner concedes that "no such argument or evidence was presented in response to the Order to Show Cause, or at the [disciplinary] hearing." *Ibid.*[9] Because petitioner failed to present the issue to the court of appeals in a timely manner and raised it for the first time in his petition for rehearing, he waived the issue. See, *e.g.*, *In re Software Centre Int'l, Inc.*, 994 F.2d 682, 684 n.2 (9th Cir. 1993);

---

of petitioner's appeals and the validity of the sanctions orders are not before the Court in the pending matter, which arises out of the disciplinary panel's imposition of a suspension order for failure to pay court imposed sanctions. Moreover, the disciplinary panel's action was not based only on the appeal in *Deherrera* that was contrary to circuit precedent, but also on petitioner's frivolous appeal in *Casillan* concerning unrelated issues.

[9] In his petition for rehearing, petitioner claimed that he "had no legal or reasoned basis for asserting an inability to pay" until the disciplinary panel conditioned his reinstatement on payment of outstanding sanctions. C.A. Rehearing Pet. 7. That is incorrect. Monetary sanctions already had been imposed on petitioner; his inability to pay those sanctions would certainly have been relevant to the Disciplinary Panel in its consideration of what remedy to impose for petitioner's failure to pay those sanctions. In addition, the court's show-cause order explicitly directed petitioner to "show cause in writing why he should not be *fined*, disbarred or otherwise disciplined," Pet. App. A5 (emphasis added), thus giving petitioner notice that the court's sanction might be a monetary one.

American Policyholders Ins. Co. v. *Nyacol Products, Inc.*, 989 F.2d 1256, 1264 (1st Cir. 1993), cert. denied, 114 S. Ct. 682 (1994); *Keating* v. *FERC*, 927 F.2d 616, 625-626 (D.C. Cir. 1991).[10]

3. Petitioner asserts (Pet. i, 22, 37-41) that the disciplinary panel abused its discretion and violated due process by failing to provide him with an evidentiary hearing. Petitioner failed, however, to give the disciplinary panel adequate cause to order an evidentiary hearing. Petitioner did not offer the disciplinary panel any indication of what factual issues he wished to develop or what kind of evidence he intended to present.[11] See Supp. Response 29-30. Absent explanation of why an evidentiary hearing was warranted, the panel did not abuse its discretion or deny petitioner due process by declining to grant petitioner's conclusory demand for such a hearing. Cf. *Codd* v. *Velger*, 429 U.S. 624 (1977) (per curiam) (due process does not require evidentiary

---

[10] In any event, it is far from clear that petitioner is financially unable to satisfy the outstanding penalties, as he claims. In his rehearing petition, petitioner listed approximately $88,000 in assets, far more than the amount of the penalties. See Pet. C.A. Rehearing Pet., Affidavit of David L. Smith (financial statement). Petitioner claimed to have approximately $247,000 in debts, exclusive of the penalties themselves, but virtually all of the claimed debt is a loan from petitioner's wife. See *ibid.*; Pet. App. A146. Petitioner did not assert in his rehearing petition, nor does he assert now, that he would be obligated to repay the loan to his wife before he could use his assets to satisfy the penalties imposed by the courts.

[11] Petitioner's supplemental response stated that he intended to present "extensive evidentiary materials, including expert testimony," but offered no hint as to the nature of such evidence. See Supp. Response 29.

hearing when litigant has not raised an issue about a factual dispute).[12]

Petitioner now asserts that, if he had been granted an evidentiary hearing, he would have presented evidence showing that (1) he was "financially unable to pay the underlying sanctions" and (2) "the appeals in the underlying cases were [not] frivolous." Pet. 38-39. It is not credible that petitioner requested an evidentiary hearing in order to present evidence on the financial issue because, as noted above, he made no reference to his financial condition in his response to the show-cause order or at the disciplinary hearing itself. As for the second issue, whether his appeals in *Deherrera* and *Casillan* were frivolous is not a question of fact that would have warranted an evidentiary hearing, even if that issue had been relevant. Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 558 & n.1 (1988) (whether government's legal position is "substantially justified" for purposes of fee award under Equal Access to Justice Act "is not [a question] of fact").

---

[12] Contrary to petitioner's assertion, the rules of the Tenth Circuit do not establish a right to an evidentiary hearing in attorney discipline proceedings, but rather provide that such a hearing "may" be conducted. See 10th Cir. R., Addendum III, § 4.3.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

JULY 1994